Nos. 78-216, 78-217 and 78-270

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA and MCI TELECOMMUNICATIONS CORP. ET AL.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA and MCI TELECOMMUNICATIONS CORP. ET AL.

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA and MCI TELECOMMUNICATIONS CORP. ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 580 F. 2d 590. The opinion of the Federal Communications Commission (Pet. App. C) is not yet reported. An earlier opinion of the court of appeals (Pet. App. B) is reported at 561 F. 2d 365.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1978, and petitions for rehearing were denied on May 8, 1978 (Pet. App. D). The petitions in No. 78-216 and No. 78-217 were filed on August 7, 1978. The petition in No. 78-270 was filed on August 17, 1978, within the time permitted by an order extending the time for filing the petition. The Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

The Federal Communications Commission issued a declaratory order that American Telephone and Telegraph Company has no obligation under 47 U.S.C. 201(a) to interconnect its facilities with the facilities of MCI Telecommunications Corp. that are to be used by MCI to provide a telephone service known as Execunet. The question presented is whether the court of appeals erred in concluding that that declaratory order was inconsistent with the court's previous

[1] "Pet. App." refers to the Appendix to the petition in No. 76-270.

decision that the Commission had authorized MCI to provide Execunet service and with its previous mandate remanding the case to the Commission for further proceedings in accordance with the court's decision.

STATUTES INVOLVED

Sections 201(a), 214(a) and (c) of the Communications Act of 1934, 47 U.S.C. 201(a), 214(a) and (c), state, in pertinent part:

> *Section 201(a).* It shall be the duty of every common carrier engaged in interstate and foreign communication by wire or radio * * *, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers * * *.
>
> *Section 214(a).* No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line * * *.
>
> *Section 214(c).* The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof

* * *, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. * * *

STATEMENT

In 1971 the Federal Communications Commission issued certificates under Section 214 of the Communications Act of 1934, 47 U.S.C. 214, to respondent MCI Telecommunications Corp. and its affiliates ("MCI"). The certificates authorized MCI to operate a transcontinental point-to-point microwave system, and were issued pursuant to a Commission policy permitting broad entry into the market for "private line" or business data communication services, as distinguished from public telephone service. *Specialized Common Carrier Services*, 29 F.C.C.2d 870 (1971), aff'd, 513 F.2d 1142 (9th Cir.), cert. denied, 423 U.S. 836 (1975).

In September 1973, shortly before MCI was scheduled to commence operation of its New York-Dallas and intermediate point service, petitioner American Telephone and Telegraph Company ("AT&T") refused to provide interconnections [2] to MCI for two of MCI's proposed services, known as foreign exchange

[2] MCI and the other specialized carriers provide only the long-distance (and usually interstate) portion of their service offerings via their own microwave communications facilities. To reach its customers, however, MCI needed the local telephone company (usually an AT&T affiliate) to connect MCI's long-distance facilities to MCI's customers' plants or offices. For these original "private line" services MCI required only a "local loop," that is, a single circuit of wire connecting the telephone or telephones of its customers to the MCI transmission facility located in the outskirts of the city.

(FX) and common control switching arrangement (CCSA).[3] AT&T claimed that MCI had no authority to provide those services. MCI applied for an order under Section 201(a) of the Communications Act requiring AT&T to interconnect to provide local exchange service, and the Commission ordered interconnection. The Commission stated that while FX and CCSA were "not specifically mentioned in the *Specialized Common Carrier Services* decision, this is because we were concerned with private line services generally, and did not specifically focus on interconnection for FX and CCSA services or any others."

[3] Foreign exchange service provides the MCI customer with a single interstate line connecting him to a distant city giving him, in effect, a local telephone in that city. Thus, a New York businessman with FX service to Washington has a line connecting him to the local Washington exchange system; he may dial local Washington numbers as though he had a telephone there, and people in Washington can call a local Washington number to reach the New York businessman. This device gives the distant private line customer "switched" access to public local exchange service in the distant city. The interconnection required for this service at the distant city is complete local exchange service and not just a local loop (Resp. MCI Br. at 7).

Common control switching arrangement service permits a customer with many office locations to connect them to each other without having to go through the regular switching system. Like FX, however, it requires interconnection for local exchange service.

Bell System Tariff Offerings, 46 F.C.C.2d 413, 425 (1974). The Commission further stated (46 F.C.C.2d at 426-427): "Our orders herein therefore make clear that [the Bell system] is to provide interconnection for all of the authorized services of the specialized carriers, including FX and CCSA." The court of appeals for the Third Circuit upheld the Commission's orders. *Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (1974), cert. denied, 422 U.S. 1026 (1975).

In September 1974 MCI filed a tariff with the Commission proposing to offer its subscribers a new service called "Execunet." With this service any MCI subscriber can connect with any telephone in a distant city that is served by MCI simply by dialing the local MCI number, an access code connecting him with MCI's point-to-point intercity microwave link, and the telephone number in the distant city. AT&T objected that the Execunet tariff amounted to an offer of long distance message telephone service, not "private line" service. The Commission agreed with AT&T and held that because Execunet was not a "private line" or a "specialized" service, it was not a service that the *Specialized Common Carrier* decision had authorized MCI to provide. *MCI Telecommunications Corp.*, 60 F.C.C.2d 25 (1976).

On petition for review by MCI, the court of appeals reversed (Pet. App. 1B-33B) (*"Execunet I"*). The court held that under the scheme of the Communications Act, a carrier may provide any service over a line certificated under Section 214(a), unless the

Commission has imposed service restrictions in the certificate pursuant to Section 214(c) and has found, as Section 214(c) requires, that such restrictions are required by the public convenience and necessity (*id.* at 18B-26B). The court noted that MCI's certificates did not contain service restrictions, and held that the Commission's *Specialized Common Carrier* decision did not constitute a determination that the public convenience and necessity required such service restrictions (*id.* at 26B-31B). The court noted that the Commission was free, either through the tariff mechanisms of Sections 203-205 or through rulemaking, to consider and determine whether the public interest and necessity warranted prohibiting services like Execunet, and remanded to permit the Commission to undertake such proceedings if it chose to do so (*id.* at 32B).

The three petitioners here all petitioned this Court for certiorari, claiming that the decision was in conflict with the court of appeals' decisions in *Bell Telephone Co. of Pennsylvania, supra*, and *Washington Utilities and Transportation Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir. 1975) and that the court of appeals erred in its interpretation of Section 214 (Nos. 77-420, 77-421, and 77-436). The Commission argued that in both of those cases the conclusion that *Specialized Common Carriers* was limited to private line services was "an essential premise for the analysis" or an "essential part of [the] decision" (77-436 Pet. 13, 15). The United States filed a memorandum stat-

ing that the Section 214 issues warranted review but otherwise reserving its position on the merits. This Court denied the petitions, 434 U.S. 1040 (1978).

Following the denial of the petitions, the Commission instituted a rulemaking proceeding to determine whether competition in long distance services would serve the public interest. *In the Matter of MTS and WATS Market Structure*, 67 F.C.C.2d 757 (1978). That proceeding is still pending.

On the day the petitions were denied AT&T asked the Commission for a declaratory order that it was not required to interconnect with MCI to provide local exchange services for Execunet. AT&T argued that *Execunet I* dealt only with MCI's authority under its Section 214 certificates, and not AT&T's obligation to interconnect under Section 201 and the Commission's decision in *Bell System Tariff Offerings, supra.* AT&T claimed that the latter decision concerned only private line services and did not apply to Execunet. On February 23, 1978, the Commission issued an opinion accepting AT&T's position (Pet. App. 1C-52C).

MCI then asked the court of appeals for an order directing AT&T and the Commission to comply with the mandate of *Execunet I*, and the court granted MCI's motion (Pet. App. 1A-24A) (*"Execunet II"*). The court held that its decision in *Execunet I "did* clearly contemplate—by virture of AT&T's representations and actions—that AT&T was required to provide interconnections for Execunet service" (*id.* at

12A; emphasis in original).[4] Furthermore, the court held that, contrary to the Commission's claim, the Commission itself had ordered AT&T to interconnect with Execunet in the Commission's *Bell System Tariff Offerings* decision, which, in the Commission's own words, constituted "broad interconnection orders * * * [requiring] Bell * * * to provide interconnection for all of the authorized services of the specialized carriers * * *" (Pet. App. 20A). Since *Execunet I* held that Execunet was an authorized service, the court concluded that the Commission's declaratory order that AT&T was not required to provide interconnection for that service was inconsistent with the *Execunet I* decision (Pet. App. 14A-18A). The court also

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[4] Thus the court stated (Pet. App. 12A-13A; footnote omitted):

> Never in the proceedings before this court did AT&T even suggest that it was not required to provide these connections, or that the question of MCI's authority to provide or expand its Execunet service was, as a practical matter, of no consequence since AT&T could and would refuse to provide the essential interconnections should we decide in MCI's favor. Quite to the contrary, in securing the modification of our original stay, in its briefs and arguments to this court, and in its petition for certiorari, AT&T consistently emphasized that a decision in favor of MCI *would* lead to vigorous and adverse competition—a result which would occur only if AT&T was required to provide the necessary interconnections for Execunet. AT&T expected and encouraged this court to take account of these representations in reaching our decisions in the Execunet matter; certainly, it did not assume that in so doing we would at the same time ignore the underlying assumptions supporting the claims of competition.

rejected the Commission's claim that the Third Circuit's opinion in *Bell Telephone of Pennsylvania*, upholding the *Bell System Tariff Offerings* orders, conflicted with its conclusion (*id.* at 18A-24A).[5]

The court of appeals subsequently denied motions to stay its mandate.

ARGUMENT

Petitioners argue that the court of appeals erred in concluding that the Commission's declaratory order was inconsistent with the Court's mandate in *Execunet I* because, they contend, *Execunet I* concerned only MCI's authority under Section 214 of the Act to provide Execunet and did not concern AT&T's obligations to interconnect with Execunet, which are governed by Section 201 of the Act. They further contend that the declaratory order was correct because Section 201 requires the Commission affirmatively to make a public interest finding before it can order a carrier to interconnect and that the Commission never made such a finding with respect to Execunet. They also claim that *Execunet II* is in conflict with the Third Circuit's decision in *Bell Telephone Co. of Pennsylvania, supra*, which, they contend, held that AT&T's interconnection obligation under the Commission's order in *Bell System Tariff Offerings* was

[5] The court also noted (Pet. App. 11A-12A) that under the Commission's declaratory order, which did not distinguish between existing and future interconnections, AT&T could withdraw the interconnections that Execunet now uses, thus eliminating the service altogether.

limited to "private lines services," which Execunet is not. None of the petitioners, however, challenge the court of appeals decision in *Execunet I*, and the Commission's petition expressly states that it "assumes that *Execunet I* is now binding on the Commission" (Pet. 8, n. 3).[6] While petitioners' contentions are not without some force, we believe that the court of appeals' decision was correct, and that in any event it does not warrant this Court's review.

1. It is true, as petitioners contend, that *Execunet I* did not expressly deal with AT&T's interconnection obligations under Section 201, and it is also true, as a general matter, that when the Commission authorizes one carrier to construct and operate a line under Section 214, it does not necessarily follow that other carriers would be obligated under Section 201 to provide interconnections with that carrier. Section 201 requires the Commission to make a separate finding that the public interest warrants interconnections.

But we do not read the *Execunet II* decision as a determination by the court of appeals of the public interest finding which Section 201 requires the Commission to make. Rather, what the court decided in *Execunet II* was that the Commission itself had already made the required public interest finding in *Bell System Tariff Offerings*, when it "broadly" ordered AT&T to interconnect for "all of the authorized services of the specialized carriers." Since *Exec-*

[6] We doubt that such an assumption would be required by this Court's denial of petitions for a writ of certiorari to review the *Execunet I* decision.

unet I (which petitioners do not now challenge) held that Execunet was one of those authorized services, it follows from the Commission's own order that AT&T is required to interconnect with it.

Petitioners argue, however, that the Commission did not contemplate services like Execunet in *Bell System Tariff Offerings* or in *Specialized Common Carriers* (and indeed expressly excluded such services from consideration). But the court concluded, correctly in our view, that those arguments were the very ones rejected in *Execunet I* and are inconsistent with the rationale of that decision. Moreover, in *Bell System Tariff Offerings* the Commission itself rejected the proposition that AT&T is obligated to provide interconnections only for those services expressly contemplated in that decision or its earlier *Specialized Common Carriers* decision. The very purpose of the Commission's "broad" interconnection order in *Bell System Tariff Offerings* was to avoid the necessity of reexamining AT&T's obligation to interconnect each time one of the specialized carriers offered a new service through its tariffs.

2. Petitioners also argue that the decision below is in conflict with the Third Circuit's decision in *Bell Telephone Co. of Pennsylvania* upholding the interconnection orders in *Bell System Tariff Offerings*, but in our view, the conflict, if any, does not require this Court's review. Those arguments are based on the fact that the Third Circuit had rejected AT&T's claim that the Commission's orders were overly broad and vague. The court stated that unless the orders were given some limiting construction "we

would be inclined to agree" with AT&T's argument, but concluded that the orders should be construed in the context of what the Commission was considering. So considered, it appeared to the Court that AT&T was required "to provide [those interconnection] elements of private line services which AT&T supplies to its affiliates * * * [and] customers * * *." 503 F.2d at 1273-1274.

Whether that analysis, in the context of a decision upholding what the Commission itself described as "broad" orders, is holding or *dicta*, is debatable.[7] But in our view the conflict, if any, does not warrant this Court's review because, as the court below noted (Pet. App. 23A), the Commission itself has not given and does not give the Third Circuit's language the literal reading that would be necessary to establish the kind of conflict petitioners claim exists. The Third Circuit's opinion refers only to "private line services," but the Commission in its declaratory order has construed its *Bell System Tariff Offerings* decision and the Third Circuit's opinion as requiring AT&T to interconnect with other "specialized services" that are not "private line services" and has explained the Third Circuit's use of the term "private line" as merely an "abbreviated expression" (Pet. App. 39C; see also Pet. App. 23A-24A). By the Commission's

[7] The Third Circuit's statement that otherwise it "would be inclined to agree" with AT&T's arguments, even if technically a holding, certainly does not reflect careful consideration of the very issue before the District of Columbia Circuit in *Execunet II*, and does not create the kind of conflict that this Court should resolve.

own analysis, therefore, the alleged conflict is hardly clear.

3. While the Commission's reading of its own statutes and its assessment of the administrative impact of the decision below are entitled to considerable deference, we do not see how the decisions below can significantly impair the Commission's performance of its statutory responsibility. Neither *Execunet I* nor *Execunet II* precludes the Commission from considering and determining whether the public interest will be served or disserved by MCI's continued provision of the Execunet service. Indeed, the Commission has commenced a broad inquiry on that and related issues. We see no reason why *Execunet I* or *Execunet II* should have any effect on the outcome of that inquiry, and the Commission has not suggested that it would. Nor do we see any important or recurring issue of administrative or communications law presented, since the decision below is based, in the last analysis, on the court of appeals' determination of what the Commission in fact decided in its *Bell System Tariff Offerings* decision.

CONCLUSION

The petitions for a writ of certiorari should be denied.

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